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No. 09-233

IN THE

Supreme Court of the United States

TRIPLE-S MANAGEMENT CORP.; TRIPLE-S SALUD, INC.,
Petitioner,

v.

MUNICIPAL REVENUE COLLECTION CENTER (CRIM),
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the Commonwealth of Puerto Rico

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* COUNCIL ON STATE TAXATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* COUNCIL ON STATE TAXATION

The Council On State Taxation ("COST") respectfully requests leave to file a Brief as *Amicus Curiae* in support of Petitioners. The interest of COST as *amicus curiae* is described *infra* at Brief, pp. 1. Counsel for Petitioners has consented to COST's filing of an *amicus* brief. However, Counsel for Respondents has not responded to multiple attempts to obtain written consent to the filing of such a brief. There are two distinct reasons why COST should be allowed to file as an *amicus* in this case.

First, with respect to the Petition filed in this case, COST makes additional observations concerning the constitutional implications of the retroactive application of the tax. A full exposition of the constitutional controversies stemming from this case by all interested and eligible *amicus* is ultimately to the benefit of the Court in its administration of writs for certiorari.

Second, COST members have a compelling interest in the Due Process issues presented by this case. COST and its members are uniquely familiar with the potential effect of retroactive state taxes beyond the borders of Puerto Rico.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

This brief *amicus curiae* in support of Petitioner is filed on behalf of the Council On State Taxation ("COST").[1] COST is a non-profit trade association formed in 1969 to promote equitable and nondiscriminatory state and local taxation of multi-jurisdictional business entities. COST represents nearly 600 of the largest multistate businesses in the United States; companies from every industry doing business in every state.

The retroactive imposition of tax is one of the most oppressive tax realities facing taxpayers today. For a government to ask taxpayers to voluntarily comply with a set of rules, and then change the rules long after the tax period is closed, flies in the face of common sense, good government, and most importantly, the Due Process Clause of the Fourteenth Amendment to the United States Constitution. This case involves a change in the interpretation of a law that was applied to tax periods for fifteen years. A retroactive change to tax liability of this magnitude seriously threatens the certainty and finality that underlies an effectively functioning tax system. While this Court has held that it may be necessary for laws to be applied retroactively in very limited circumstances, a fifteen-year retroactive period should violate Due Process under any circumstance.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* has made a monetary contribution to the preparation or submission of this brief. The parties received timely notice of *amicus's* intent to file this brief. Petitioner has consented to the filing of this brief and their letter has been filed with the Clerk of this Court. Respondent has not responded to attempts to obtain consent.

During the past decade, some states have attempted, and in most cases succeeded, in subjecting taxpayers to retroactive tax, whether promulgated by statute, regulation, or some other administrative action. While rarely reviewed, many of the retroactive laws and interpretations that do end up in court have been upheld as a result of the misapplication of this Court's precedent. The tendency of state courts to rubberstamp possibly unconstitutional retroactive tax legislation not only affects the taxpayers subject to the retroactive provision at issue, but also creates a bad example for other states to follow. Further, frequent retroactive application of new tax laws creates suspicion among taxpayers and reduces respect for the tax system. The failure of state courts to apply the proper Due Process standard to retroactive tax legislation validates and perpetuates the enactment of retroactive tax legislation by states throughout the country.

Most COST members have been subject to the application of some type of retroactive tax in the conduct of their trade or business. COST members routinely challenge retroactive tax imposition, but find a severe lack of consistency in state court decisions based on state courts' varied interpretations of the Due Process Clause. This lack of consistency creates extreme uncertainty for the business community where taxpayers crave finality as to their expected and actual state tax liabilities. Given these considerations, COST members have a substantial interest in maintaining a uniform and functional standard under which to analyze retroactive tax legislation imposed by state legislatures or taxing authorities. The current state tax regimes, as evidenced by this case, are not serving this interest. COST members both individually and collectively

disadvantaged by the inconsistent and impermissible application of retroactive taxation.

STATEMENT OF THE CASE

Triple-S is a low cost medical and hospital insurance provider, organized in 1959 as a for profit corporation. In 1976, shortly after its formation, the Puerto Rican Department of Treasury (hereinafter Treasury) granted Triple-S an income tax exemption which was later expanded to cover both real and personal property. In order to ensure their tax exempt status, Triple-S operated as a non-profit entity and routinely complied with numerous requirements laid out by Treasury. For nearly 30 years Triple-S complied with the requirements, operated as a non-profit entity, and the Treasury assured it of its tax exempt status, as expressly provided in six different administrative letter rulings issued by both the Treasury, and its predecessor for collecting real and personal income taxes, the Municipal Revenue Collection Center (hereinafter CRIM). The CRIM issued the last letter ruling affirming Triple-S' tax exemption status in 1998

In 2003, the Treasury changed its policy to only allow those entities actually organized as a non-profit, and not just operating as one, tax exemption status. The Treasury notified Triple-S of the new policy's prospective application. Shortly thereafter in 2006, the CRIM decided to retroactively apply their new policy and revoke Triple-S' tax exemption status going as far back as 1991, the year the CRIM was created. The CRIM asserted that because their prior policy had been "erroneous," Triple-S had no right to tax-exempt status, despite their reliance on six administrative letter rulings over the course of nearly 30 years confirming that status.

SUMMARY OF ARGUMENT

This Court should grant certiorari and review this case for two compelling reasons. First, the court below incorrectly applied the Due Process Clause standard to the retroactive tax, resulting in a clearly erroneous decision that runs afoul of any of the standards established by this Court. The decision below offends even the narrowest reading of the Due Process Clause. Second, the decision below illustrates but one example of how taxing jurisdictions continue to impose retroactive taxes either judicially or administratively. The business community throughout the nation is significantly concerned about the continued inconsistent and frequently incorrect application by state courts of the Due Process Clause standard to challenges brought against retroactive taxes.

ARGUMENT

I. THE COURT BELOW INCORRECTLY CONCLUDED THAT THE RETROACTIVE APPLICATION OF TAX TO THE TAXPAYER WAS CONSTITUTIONAL.

The Fourteenth Amendment of the U.S. Constitution grants substantive protection against deprivation of life, liberty, or property without due process of law. This Court in *Welch v. Henry*, 305 U.S. 134 (1938), set the standard for determining whether the retroactive imposition of tax infringes upon due process. According to the Court, it is "necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation." *Id.* at 147. More recently, this Court has also factored

notice into the determination of whether the retroactive application of tax laws violates due process. *United States v. Hemme*, 476 U.S. 558 (1986). In *Hemme*, this Court identified one of the relevant circumstances to be "whether, without notice, a statute gives a different and more oppressive legal effect to conduct undertaken before enactment of the statute." The Court in *Carlton* also determined that lack of notice, although not dispositive, is clearly relevant to the due process analysis. *United States v. Carlton*, 512 U.S. 26 (1994).

The CRIM's retroactive assessment of the taxpayer raises serious constitutional concerns under the standards set out in *Welch, Hemme* and *Carlton*. While the present case does not involve the legislation at issue in *Welch, Hemme*, and *Carlton*, it does present an even more egregious retroactive tax imposition than the legislation that was challenged in those cases.

In *Carlton* which is the most recent and influential Supreme Court case dealing with this issue, the Court articulated a two-part test to determine if retroactive tax legislation violates Due Process. First, the Court looked at whether the purpose of adopting the law was illegitimate, arbitrary, or based on an improper motive, such as targeting a taxpayer after deliberately inducing them to engage in a transaction. Second, the Court looked at whether the period of retroactivity was modest. These tests, when applied to the CRIM's action in the present case, support the conclusion that the CRIM's retroactive imposition of tax violates Due Process.

The first prong of the two-part *Carlton* test is not satisfied; the CRIM's letter to the taxpayer expressly encouraged the taxpayer to rely on that guidance in

organizing and conducting their business operations in Puerto Rico. Based on that guidance and assurance, the taxpayer organized their business operations accordingly. The taxpayer was further led to believe that the CRIM's guidance had the force of law and was binding until expressly revoked. After encouraging the taxpayer to rely on the CRIM's published guidance to structure their business operations, the CRIM now seeks to impose a retroactive assessment. The CRIM's retroactive imposition of tax is undoubtedly the type of improper motive *Carlton* was intended to prevent—specifically targeting taxpayers after inducing them to engage in business.

The second prong of the two-part *Carlton* test is also not satisfied; the period of retroactive imposition was not modest. While the *Carlton* court did not establish a bright line rule for determining what is considered a modest period of retroactivity, Justice O'Connor in her concurring opinion declared that "[A] period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise, in my view, serious constitutional questions." *Carlton*, 512 U.S. at 38 (O'Connor, J., concurring). Regardless of what might be the appropriate period over which a state can retroactively impose a tax, the 15-year period at issue here is assured to offend any standard.

While the retroactive application of tax here involves an expansive period of 15 years, the court's ruling below allows for the retroactive application of tax over even greater periods. For example, taxpayers often conclude, relying on written guidance published by an adjudicatory body, such as that relied on by Triple-S, that they did not need to file tax

returns for certain prior years. Because taxpayers fail to file certain returns, relying on written guidance at the time dictating that they did not need to, the statute of limitations will never begin to run in the event that the administrator later withdraws the written guidance retroactively and seeks an adjustment. This leaves taxpayers in the precarious position of being liable for taxes due as far back as when they started doing business in the jurisdiction.

The unbridled retroactivity by the CRIM, while not accomplished by legislation, should not be tolerated simply because it is accomplished by executive fiat. An outrageous period of legislative retroactivity that cannot be tolerated under *Carlton*, should not be tolerated when imposed by a tax administrator. The same notions of fundamental fairness are involved whether the retroactive imposition of law occurs by acts of the legislature or by affirmative interpretations of an executive agency. Legislative decision-making is subject to public scrutiny and debate, but a tax administrator's retroactive application is often based solely on judgment. The Constitution does not accede a person's due process rights to violation by a specific branch of government—due process is absolute. Fundamental fairness should be as protected from encroachment by agency action as it is from legislative action—both have the force and effect of law.

Regardless of how the *Carlton* line of cases fit within this analysis, the CRIM should be precluded on principals of fundamental fairness and manifest injustice from retroactively assessing tax liabilities. It is critical to the fair and efficient administration of every state's tax laws to ensure that when an administrative agency issues policy directives that require

compliance upon pain of penalty and interest, taxpayers who rely on such pronouncements in good faith are not later punished for the government's error. Taxpayers that justifiably rely on promises made by their government should not do so at their peril. No less than the credibility of, and trust in, our government is at stake. This concept of trust in government is fundamental and has been emphasized by this Court on numerous occasions. *See generally St. Regis Paper Co. v. United States*, 368 U.S. 208, 209 (1961) (Black, J., dissenting) ("Our Government should not by picayunish haggling over the scope of its promise, permit one of its arms to do that which, by any fair construction, the Government has given its word that no arm will do. It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their Government."); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 383, 387-88 (1947) (Jackson, J., dissenting) ("It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street").

This fundamental principle that those who justifiably rely on promises made by their government can do so safely, reflects the strong belief of the Framers of the Constitution. The taxpayer was reasonably justified in relying on the exemption letters. After all, the administrator gave Triple-S written assurances that they could, and should, so rely. The CRIM would ask this Court to declare that persons should not, and cannot, rely on assurances made by their government, for if they do, they proceed at their own peril. This is not good government; and this is certainly not due process of law.

II. THE BUSINESS COMMUNITY IS CONCERNED ABOUT THE INCONSISTENT AND INCORRECT APPLICATION BY STATE COURTS OF THE DUE PROCESS CLAUSE STANDARD FOR CHALLENGING RETROACTIVE TAX.

Unfortunately, the acts of the CRIM, while on the extreme edge in terms of length of retroactivity, are certainly not unique.[2] Taxpayers are relentlessly forced to retroactively comply with tax laws. Further guidance by the Court as to the proper scope of retroactivity would provide much needed assistance to state courts addressing this issue. Taxpayers and tax administrators routinely struggle with retroactive application.

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[2] While the length of the retroactivity in this case is on the extreme edge, states imposing more modest retroactive taxation of multistate taxpayers that arguably infringes on their Due Process rights can have a more significant impact on taxpayers by exposing them to the possibility of double taxation. In the multistate context, taxpayers often must rely on a state tax administrator's guidance as to whether certain items of income should be reported in their state or another. Assuming a taxpayer relies on that advice and does not include an item in income in that state, the taxpayer will likely have included it in income in another state. If that guidance is later retroactively withdrawn and taxpayers are subjected to tax in that state, they will thus have been subjected to double taxation. This problem is amplified for taxpayers if the statute of limitations in the state they originally paid tax to has closed. In that case they cannot pursue a refund and will be unable to alleviate the double taxation. Through this process, it is clear that tax administrators can inflict more harm on taxpayers than just that of retroactive taxation in their own state—they can potentially subject taxpayers to double taxation for which they very well might have no remedy.

For example, in *Maryland v. CBS, Inc.*, No. 88364053 (Md. Cir. Ct. 1989), *rev'd*, 575 A.2d 324 (Md. 1990), the Maryland Circuit Court found that retroactive decisions in the tax context were usually only an abuse of discretion where the court finds the taxpayer justifiably relied to their severe detriment on the prior status of the law. In that case, CBS, who was challenging a change to its sales factor, could not show justifiable reliance because the change in law would not have resulted in CBS changing its behavior in any way.

In contrast to the CRIM's retroactive application of a change in their policy, in *Praxair Tech., Inc. v. Division of Taxation*, 961 A.2d 738 (N.J. Super. Ct. App. Div. 2008), *certification granted*, 970 A.2d 1047 (N.J. Apr. 02, 2009), the Superior Court of New Jersey, Appellate Division reversed the lower court and held it would not retroactively apply a current interpretation of the law based on the fact that the statute had been amended and a new example added to the regulations. The court explained the amendments clarified the scope of the statute, and the Court would not apply the current interpretation of the law under the amendments to years occurring prior to the amendment.

In *U.S. Bancorp v. Dep't of Revenue*, 103 P.3d 85 (Or. 2004), the Oregon Supreme Court upheld the Oregon Department of Revenue's application of a regulation issued in 1995, to tax years starting in 1988. As applied, the regulation had an eight-year retroactivity period and was used by the Department of Revenue to assess almost $10,000,000 in new taxes and interest against U.S. Bancorp by including an additional factor—intangible property—in the taxpayer's income apportionment formula for all tax

years that remained open for audit. Because U.S. Bancorp had extended its federal statute of limitations to allow the Internal Revenue Service to conclude its audit process, U.S. Bancorp's tax returns remained open to audit as far back as 1988, well beyond the standard three-year statute of limitations that applied to other Oregon taxpayers.

In *Rivers v. State*, 490 S.E.2d 261 (S.C. 1997), the South Carolina Supreme Court invalidated the retroactive application of tax legislation to tax years two to three years before the legislation was enacted. In reaching its decision, the court cited *Carlton* for the proposition that tax legislation with a period of retroactivity greater than one year is constitutionally suspect.

The conflicting state supreme court decisions evidence the strong need for this Court's intervention to dictate a clear and precise standard and prevent the continued development of inconsistent case law. Given the increasing frequency of state enactment of retroactive tax legislation, the United States Supreme Court should seize this opportunity to provide unambiguous guidance on the proper constitutional standard for testing the constitutionality of retroactive tax legislation.

CONCLUSION

For the reasons stated above, COST respectfully requests the United States Supreme Court to accept this case for review.

Respectfully submitted.

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